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CHAPTER 4

EDWARD I TO RICHARD II: STATUTES AND SOCIAL REVOLUTION

SUMMARY

We now come to a period of steady growth in the common law covering just over a century and a quarter (1272–1399). The reign of Edward I is marked by one of the greatest outbursts of reforming legislation in English history until the nineteenth century.[1] The first Statute of Westminster (1275) made numerous changes in procedure, many of them designed to protect the subject against the King's officers, for the evidence collected by the commission of inquiry set up in the previous year had revealed a good deal of oppression.[2] The statute may be regarded in some ways as being a sort of supplement to the Great Charter, which was now fifty years old. The Statute of Gloucester (1278) made important amendments to the law of land, especially on the subjects of waste, curtesy and dower. The next year the great Statute of Mortmain did something to check the feudal losses which resulted when land was given to churches, monasteries and corporate bodies, by completely forbidding all amortisation.[3] In 1284 we have a remarkable statute re-stating the fundamentals of the common law for the information of sheriffs who were engaged in applying English law to the newly conquered land of Wales. This statute is so long that it almost amounts to a short treatise on the state of the law in 1284; its practical interest to historians is therefore considerable, for it contains information which is difficult to find elsewhere.

[1] See generally, Plucknett, *Legislation of Edward I* (1949).

[2] H. M. Cam, *Studies in the Hundred Rolls*, 36.

[3] By a "secret of law" (Co. Lit. 99) the crown dispensed with the statute; see Wood-Legh, *Church Life under Edward III*, 60 ff.

WESTMINSTER THE SECOND

The next year (1285) saw an astonishing series of epoch-making statutes. Of these the first was the second Statute of Westminster, which leaves hardly a single department of the law untouched. Of its fifty chapters, the first is the famous *De Donis* of which we shall have much to say later on, for it lies at the foundation of the idea of legal estates in land. Among many others are the following important provisions. The common mode of fraudulently conveying land by allowing judgment to go by default in a collusive action brought for the purpose was checked (c. 4).[1] The rights of joint-tenants and reversioners were given more prompt protection in such cases, and it was enacted that this device should not bar a widow's claim to dower. By chapter 11 a very stringent process was created for the action of account. In its origin it dealt with the relationship of the lord of a manor to his bailiff or estate manager, but as history proceeds it becomes a commercial as well as a feudal action, and the regular remedy lying between partners. The statute imposes imprisonment as soon as an accountant is found in default, and this penalty can be inflicted by the lord's auditors without the intervention of a court. Equally drastic is the penalty upon the sheriff or gaoler if such a prisoner escapes, for in such a case the gaoler shall be liable to the lord in the same sum as the accountant was. This perhaps is a reflection of the insecurity of mediaeval prisons, which were by no means so massive as is sometimes thought. Chapter 18 established the writ of *elegit* whereby a judgment creditor could, as an alternative to the old *fieri facias*, elect to take all the debtor's chattels and to hold half of his lands until the debt be levied out of the chattels and the rent.

THE STATUTE AND SIMILAR CASES

Chapter 24 contains the famous provision that—

> " whensoever from henceforth it shall happen in the Chancery that there is to be found a writ in one case, but not in another case although involving the same law and requiring the same remedy, the clerks of the Chancery shall agree in framing a writ, or else they shall adjourn the plaintiffs to the next Parliament, or else they shall write down the points upon which they cannot agree and refer them to the next Parliament, and so a writ shall be framed by the consent of the learned in the law; to the end that the court from henceforth shall no longer fail those who seek justice."

Here indeed is laid down a regular procedure for the steady expansion of the law by the enlargement of the available writs in certain narrowly defined circumstances. Its primary object was to authorise the extension of remedies which already existed between parties, so that they would become available between the heirs (or successors in office) of those who would primarily have been entitled to use them. It is clear that the

[1] This device was invented in order to convey the property of a married woman against her will, and to enable life tenants to defeat reversions, *etc.*

Chancery clerks did not regard this statute as giving them wide powers of creating new forms of action, for where we find the chapter invoked at all (and it is not very often) it is used with great caution. The only serious extension of the law as a result of the statute was the creation of the writ of entry *in consimili casu*.[1] In fact, the large part assigned to Parliament in the chapter shows that it was the general feeling that matters of legislative importance ought to be handled there. In the fourteenth century, moreover, parliamentary proceedings were often extremely informal, and are by no means always recorded on the rolls; consequently it is most likely that these statutory powers were exercised, if at all, by the little group of administrators and lawyers who formed the kernel of the fourteenth-century Parliaments. Very soon, however, the statute rolls seem regularly to contain express declarations in legislative form as to the extension of old writs to new cases, and it may well be that the form of a statute was chosen because the publicity attaching to it made the reform more quickly effective.[2]

BILLS OF EXCEPTIONS

Chapter 31 relates that it sometimes happens that parties who allege an exception which the court overrules have difficulty when they attempt to test the lawfulness of the decision by a writ of error, because the court may not have enrolled the unsuccessful exception. The higher court is therefore unable to pass upon the matter because it is not on the record before them. To remedy this, the statute allows such exceptions to be written down in a " bill " to which the trial judge must affix his seal. If the exception is not enrolled, then the " bill of exceptions " is to be sufficient record for proceedings in error. The chapter shows that the roll is still under the absolute control of the court, which can include or exclude matters in its discretion; it is not surprising that judges said many hard things against the new " bill of exceptions " and more than once flatly refused to seal them.[3]

THE NISI PRIUS SYSTEM

Chapter 30 regulated the new system of *nisi prius* justices, who become more important in practice as a result of many succeeding statutes amending the system in details. In this way it became less necessary for juries from remote parts of the country to undertake the slow and costly journey to Westminster.

In the same year the Statute of Winchester established a system of police by compelling citizens to possess armour according to their means

[1] Below, p. 362.

[2] For the modern theory that the action of case is based upon this statute, see below, pp. 372–373, and compare pp. 163–164.

[3] Plucknett, *Statutes and their Interpretation* (1922), 67; *Bridgman* v. *Holt* (1693) Shower, P.C. 111 is a late example of this attitude.

for the defence of the peace. Then the Statute of Merchants (also of 1285) established a system of recording debts and of making land liable to execution, which lasted down to the eighteenth century with some modifications.[1] In 1290 we find the great Statute *Quia Emptores* which has been rightly called one of the pillars of real property law.

The burden of foreign war and the Crown's growing need for money provoked a good deal of unrest, and finally, as the price of a heavy grant of taxes, the King had to confirm the Charters. It was on this occasion (1297) that the Great Charter was first enrolled among the public archives.

EDWARD I AND FEUDALISM

There is one general aspect of Edward I's legislation which has especial interest. This is the belief of many historians, expressed in several different forms, that there was something anti-feudal in his policies.[2] We have already mentioned the fact that the Statute of Marlborough was passed under his influence and is historically part of the great mass of legislation passed in Edward I's reign, and so we shall consider it together with the statutes of Westminster the first and second, and especially the statute of *Quia Emptores*. Of the Statute of Marlborough Maitland wrote that "in many respects it marks the end of feudalism",[3] and of Edward's legislation as a whole Stubbs wrote that it endeavoured to eliminate the doctrine of tenure from political life.[4] These two statements, sometimes repeated in less guarded language by other historians, deserve more minute examination than can be accorded them at the present moment, but a few general observations can be made.

It would indeed be a remarkable tribute to the intellectual powers of Edward I if it could be shown that he set his face against the whole pattern of contemporary society as it existed throughout civilised Europe. The demand for a new social structure is common enough in our own day because we have numerous examples, both contemporary and in the history of the last two generations, of revolutionary attempts to remodel society on the lines of military and economic dictatorships, communes, soviets and the like. But it is hard to imagine a statesman of the year 1300 suggesting an alternative to the social structures over which three such legal-minded monarchs as Edward I, Philip the Fair and Boniface VIII presided.

If Edward's legislation is examined, it will be seen that its general tendency is not to weaken, but to strengthen, the position of feudal lords. Lords must have been grateful for two statutes which gave

[1] The earlier Statute of Acton Burnell (1283) was much less stringent; for details, see Plucknett, *Legislation of Edward I*, 140–148.

[2] For what follows, see Plucknett, *Legislation of Edward I* (1949), 21–23, 157.

[3] Maitland, *Equity and Forms of Action*, 336. Cf. Pollock and Maitland, i. 209, on Bracton's attitude towards the Church and baronage.

[4] Stubbs, *Constitutional History*, § 179.

them immense power over their bailiffs;[1] the feudal rights of wardship and marriage were protected by new civil and criminal procedures;[2] the default of tenants in paying services (which at this moment left the lord in a very weak position) was for the future visited with the forfeiture of the tenement;[3] and lords were also given extended powers of appropriating commons.[4] Most striking of all, Edward I risked a bitter quarrel with the Church over mortmain in order to prevent lords losing their feudal incidents when land passed to ecclesiastical bodies,[5] and *Quia Emptores* itself was designed in order to preserve those same rights of wardship, marriage, relief and escheat.[6] Continued sub-infeudation would probably have introduced such chaos into the system of tenures that these incidents would have eventually been evaded almost universally, but *Quia Emptores* perpetuated them. Edward I certainly did a great deal for the feudal lord. But he was not prepared to tolerate abuses, and he was equally active in assuring to tenants their rights. Many great statutes defined the law of distress and replevin,[7] and the action of mesne (which protected a sub-tenant when his lord defaulted in services to the lord above) was made more practicable.[8] There seems no escape from the conclusion that this legislation assumed the reasonableness and desirability of the feudal structure, and deliberately strengthened it. The fact that all the incidents of military tenure survived until the sixteenth century, and that the persons interested in them were to enjoy them for an additional century (thanks to the statute of uses), is all testimony to the soundness of the legal structure of feudalism as Edward I left it. His policy in fact was based on that simple and straightforward idea of " justice " which was taken as an axiom in the middle ages—the rendering to every man his own. Edward assured to the tenant the peaceful enjoyment of his lands with the same impartial justice as he confirmed to the lord the fruits of his seignory.

EDWARD II AND THE ORDINANCES

The troubles which began in the reign of Edward I became chronic under his son, Edward II (1307–1327), and once again an attempt was made by a series of " Ordinances " (1311) to put the Crown under the domination of a group of barons.[9] For a time they were successful, but in the end a counter-revolution repealed the Ordinances by the

[1] Marlborough, c. 23; Westminster II, c. 11; above, p. 28.

[2] Marlborough, c. 7; Westminster II, cc. 16, 35.

[3] Gloucester, c. 4; Westminster II, cc. 21, 41.

[4] Westminster II, c. 46.

[5] *De Religiosis*, 7 Edw. I.

[6] 18 Edw. I; see below, p. 541.

[7] Marlborough, cc. 1, 2, 4, 9, 15; Westminster I, cc. 16, 35; Westminster II, c. 2.

[8] Westminster II, c. 9.

[9] The Ordinances are printed in *Rot. Parl.*, i. 281.

famous Statute of York (1322). This Statute contains the important declaration that matters relating to the estate of the King and the country must be agreed upon by the prelates, earls, barons and commons in parliament. It has been very persuasively argued[1] that this statute already shows a feeling that matters which would now be called "constitutional" ought to be reserved for very special deliberation in a parliament which contained commons as well as lords. In any case,

> "it is not too much to say that one result of the reign of Edward II was the establishment of the practice of regarding only those parliaments as true parliaments which contained representatives of the commons".[2]

EDWARD III: THE BLACK DEATH

The tragic ending of the reign and the mysterious death of the unfortunate Edward bring us to the reign of his son, Edward III (1327–1377), and a period of fifty years of uneasy tension. Once again we find the Charters solemnly confirmed in 1352. The middle of his reign was marked by a series of fearful calamities which have left their mark upon society and the law. The nation was already weakened by a succession of famines when the arrival of the Black Death (1348–1349) from the East wrought a revolution in social and economic conditions. The terrible mortality from this plague completely disorganised the manorial system, which had hitherto depended upon a plentiful supply of labour born and bred within the manor. The plague accelerated and intensified forces which were already at work, and the result was a very serious depletion of the labour supply. The population of the manor was no longer sufficient to work the lord's estates. Consequently lords began to compete among themselves for such free labour as was available. This tempted servile inhabitants of manors to leave their holdings and become hired labourers. So keen was the competition that a series of ordinances and statutes beginning in 1349 regulated for the first time the relationships between master and servant, and provided machinery for the establishment of scales of wages above which any payment would be unlawful.[3] This system depended largely for its operation upon the "justices of labourers" (later justices of the peace), and remained in force as late as the eighteenth century.

RICHARD II: THE PEASANTS' REVOLT

The situation culminated in the next reign in the Revolt of the Peasants of 1381. Into the long controversy over the causes and character of this rising we cannot enter at this moment, but very briefly stated, the history of the revolt may be summarised like this. In the first place, it is clear that the old theory which saw the cause of the revolt in a

[1] By G. T. Lapsley in English Historical Review, xxviii. 118–124, and in his *Crown, Community and Parliament*, 253 ff.; cf. C. H. McIlwain, *Political Thought in the West*, 377–378; G. L. Haskins, *The Statute of York* (1935).

[2] T. F. Tout, *Place of Edward II* (Manchester, 1914), 151.

[3] B. H. Putnam, *The Statute of Laborers* (1908).

supposed attempt by landlords to reimpose the conditions of serfdom after having first abandoned them is no longer tenable. It seems rather that in this, as in many other revolts, the motive of the movement was not so much a blank despair as a certain hopefulness. It is not in the depth of the night that social revolutions occur, but with the first gleam of dawn. The economic results of the Black Death had already brought a considerable improvement in the lot of the agricultural labourer, and it was the disappointment that this improvement had not been spread more equally among the masses, or proceeded more rapidly, that provoked the impatient peasants to rebellion. The insurgents were mainly those who had not yet been able to establish their position as free labourers, and their hatred was principally directed against the lawyers and the stewards who kept manorial records. Wherever possible the rebels destroyed the manorial rolls which contained the legal evidence of their servitude. The parochial clergy seem to have viewed the movement with considerable sympathy, although the higher ecclesiastics were markedly indifferent. It is now clear, moreover, that the ideas of the early reformer Wyclif played very little part in the movement, although it is certainly true that there were active agitators who were preaching a somewhat crude form of communism. Several independent risings occurred in different parts of the country, and one body of rebels was welcomed by the mass of the Londoners who were at odds with the mayor. A serious massacre took place in the streets of the city, and the rebels beheaded John Cavendish,[1] Chief Justice of the King's Bench, the Archbishop of Canterbury and the Lord Treasurer.

It is very difficult to find any clear results of the revolt. Indeed, the latest opinion tends to lay stress upon the ineffectiveness of the whole movement. It was one of the very few occasions in English history when a definitely social, as distinct from a political, revolution, was proposed, and its failure was immediate and complete. Fortunately, the natural movement towards the emancipation of villeins, which had long been in progress, continued as before the revolt, and during the following century a great silent revolution slowly took place. The majority of the populace who had been serfs gradually acquired economic independence. Lords of manors who could no longer find servile labour, either leased their lands to free labourers (or to labourers who were soon to become free), or else tacitly conceded to their peasants the benefits of ownership in their holdings. This latter process is truly remarkable, and deserves close attention from students of legal history. Through the machinery of custom, which was always a powerful influence for experiment or change in the middle ages, the rightless villein slowly acquired customary property rights in the land he worked. For a long time the common law refused to recognise this process, and it was

[1] Cavendish was in fact entitled to the gratitude rather than the enmity of the peasants, for tradition ascribes to him an important decision in their favour; Y.B. 13 Richard II (Ames Foundation, ed. Plucknett), 123–124.

to the courts of equity that the customary tenant, or copyholder as he was later called, looked first for protection.[1] In the early seventeenth century Sir Edward Coke took up the cause of the copyholders, and finally extended to them the protection of the common law courts. In this way those sweeping and violent social revolutions which occurred in Switzerland and France were avoided in English history through the slow adaptation of the law to new social conditions, no doubt assisted by the lack of a precise definition of property, while the willingness to tolerate for a time a few anomalies helped to accomplish by peaceful means the great task of transforming the ancient serfdom into a class of free workers.

Throughout this period we find the steady growth of the legal profession and the development of a remarkable series of law reports called "Year Books" which we shall describe later. Then, too, Parliament becomes more definite in its composition and gradually takes its place as the ultimate court in the land, as a national legislature, and as a representative body which could give voice to the feelings of the nation when the ministers of the Crown incurred its dissatisfaction.

Richard II (1377–1399) is one of the most picturesque and puzzling figures in English history.[2] The troubles in his reign (apart from the Peasants' Revolt) were ultimately of a dynastic character, turning upon the conflicting claims of the Houses of York and Lancaster to succeed. Richard's tactless policies gave an opportunity to the House of Lancaster to steal a march upon the Yorkists, and the result was the deposition, and soon the mysterious death, of Richard II in 1399.

[1] For a summary of the legal problem see Y.B. 13 Richard II (Ames Foundation), xxxii–xliii.

[2] Professor Tout has given a noteworthy history of the reign from a novel standpoint in his *Chapters in Administrative History*, vols. iv. and v. A later survey is by A. Steel, *Richard II* (1941).